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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL LUSTIG,

Defendant.

Case No.: 13CR3921-BEN

Date: August 5, 2014
Time: 9:00 a.m.

UNITED STATES' TRIAL
MEMORANDUM

The United States of America, by and through its counsel, Laura E. Duffy, United States Attorney, and Alessandra P. Serano, Assistant U.S. Attorney, files its trial memorandum.

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I

STATEMENT OF THE CASE

A. INDICTMENT

On October 23, 2013, a federal grand jury returned a two-count indictment charging defendant Michael Lustig aka “George” with two counts of sex trafficking of a minor in violation of 18 U.S.C. § 1591, and criminal forfeiture.

B. TRIAL STATUS

A jury trial is scheduled for Tuesday, August 5, 2014, before the Honorable Roger T. Benitez. The United States’ case-in-chief is expected to last two days.

C. STATUS OF COUNSEL

Defendant is represented by retained counsel, Timothy Scott.

D. CUSTODY STATUS

Defendant is in federal custody.

E. INTERPRETER

The United States will not require an interpreter for any of its witnesses.

F. JURY WAIVER

The parties have not waived their right to a trial by jury.

G. PRETRIAL MOTIONS AND MOTIONS IN LIMINE

On December 2, 2013, Defendant filed a motion to compel discovery and leave to file further motions. The next day, the United States filed a response and opposition to the motion.

On December 31, 2013, Defendant filed a motion to suppress evidence based upon the a warrantless search of a cell phone, motion to dismiss indictment because §1591 is unconstitutional, motion to suppress evidence from Yahoo!, Inc. and motion to suppress evidence obtained from administrative subpoena. On January 10, 2014, the United States filed its response and opposition.

1 On March 11, 2014, the Court issued a 27-page written opinion denying the
2 motion to suppress evidence and motion to dismiss the indictment. On March 14,
3 2014, Defendant filed a motion for reconsideration of the motions. On April 6,
4 2014, the United States filed its response and opposition to the motion for
5 reconsideration.

6 On April 14, 2014, the Court orally denied the motion for reconsideration
7 and set the trial date.

8 On July 7, 2014, Defendant filed three motions in limine: (1) motion for
9 reconsideration the warrantless search of the cell phones; (2) motion to exclude
10 evidence of the minors' ages and (3) motion to preclude 404(b) evidence.

11 On July 21, 2014, the Court denied the motion for reconsideration of the
12 motion to suppress and motion to exclude evidence of the minors' ages, but
13 granted the motion to preclude 404(b) evidence relating to the 1985 conduct.

14 **H. STIPULATIONS**

15 The parties have not entered into any stipulations.

16 **I. DISCOVERY**

17 The United States has complied, and will continue to comply, with its
18 discovery obligations. Defendant has not produced any reciprocal discovery.

19 **II**

20 **STATEMENT OF FACTS**

21 **A. Initial Contact**

22 On June 8, 2012, San Diego Sheriff's Deputies Chase Chiappino and George
23 Crysler conducted a "john op" targeting prostitution customers at the Howard
24 Johnson motel in Encinitas, California. An online prostitution ad for an adult
25 female was posted. A person identifying himself as "George" contacted the phone
26 number on the ad and requested "full sex." "George" was advised of the location
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1 of the female. "George" later called back and said he was in the parking lot of the
2 hotel. The undercover officer told "George" she was in room 235.

3 At approximately 10:05 p.m., "George" later identified as Defendant
4 Michael Lustig knocked on the door of room 235. Defendant entered and wanted
5 to touch the undercover officer. The officer stated he had to pay the money first.
6 Defendant stated the situation was "all too suspicious" and left the room. He was
7 arrested outside the room for soliciting prostitution in violation of California PC
8 647(b).

9 **B. Multiple Phones are Located**

10 At the time of his arrest, Deputy Chiappino seized an Iphone (619-791-
11 6552) found in Lustig's pants pocket. The web browser displayed the ad
12 advertising the undercover officer as a prostitute. A second phone (Kyocera flip
13 phone 619-634-9405) was located in another pants' pocket. Deputy Chiappino
14 also located bottles of lubricant and cash in a jacket pocket.

15 A search of the Kyocera phone revealed multiple prostitution related texts
16 such as "U wanna hook up for a rewarding time this evening?" "Please confirm u r
17 18 years or older." "...see if we want a mutually beneficial relationship." "I still
18 have the room if u wanna earn more & finish what we started."

19 Deputy Chiappino located a set of car keys on his person. Defendant denied
20 having a car and stated he walked to the hotel. Deputies took the keys and located
21 a black 2011 Lincoln MKZ in the Howard Johnson parking lot.

22 A search of his vehicle revealed five additional phones in the center armrest
23 of the vehicle. The data of all five phones was downloaded. Of the five phones,
24 two phones had text messages relating to prostitution: a Verizon Wireless Samsung
25 cell phone ((619) 977-4300) and a Cricket Samsung cell phone ((619)799-3816).
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1 A listing in the Cricket Samsung phone was for "Dominick", which had the
2 number (619) 381-3539 assigned to it. Another phone number assigned to
3 "Dominick" was located inside Lustig's iPhone was (619) 647-6033. Thus, there
4 were two numbers associated with "Dominick" each saved in a different phone
5 belonging to Lustig.

6 A search through law enforcement databases revealed the phone number for
7 "Dominick" 619-381-3539 as being associated with a twelve year old minor (DOB
8 2/2000) female (hereinafter "MF1"). Lustig's Cricket Samsung phone showed
9 dozens of text messages to or from MF1 between March 24, 2012 and June 8,
10 2012. There were over 100 received, sent or missed calls between Lustig and MF1
11 between the same dates.

12 Deputy Chiappino later investigated the contacts inside Lustig's Kyocera flip
13 phone. One of the contacts in Lustig's Cricket Kyocera phone was under the name
14 of "Andrew" and displayed the telephone number (602) 930-8687. Deputy
15 Chiappino conducted a search through law enforcement databases, which
16 displayed that phone number being associated with a 14 year old (DOB: 1/1998)
17 minor female (hereinafter "MF2"). Lustig's Kyocera phone displayed over sixty
18 text messages between Lustig and MF2 between October 13, 2011 and December
19 15, 2011. Lustig and MF2 appeared to use the words "Bookstore" and "Library" as
20 terms to meet up for a date of prostitution. Some of those text messages read as
21 follows: "Hey is bookstore open at all today I'm in desperate need of books rite
22 now..." "Where are you? CV, LM or ???" "U free sumtime during the next 2
23 hours?" "Yes wuts tha latest time yu can cum?" "Is tomarrow morning or noon
24 possible if not thts fine but tomarrow would be best for me".

25 In sum, Lustig's phone analysis revealed as follows:
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1 The Samsung Cricket phone had MF1 saved as "Dominick" with 39 text
2 messages between March 24, 2012 and June 8, 2012 and 89 calls between March
3 26, 2012 and June 8, 2012.

4 The Samsung Verizon phone had MF1-2 saved under "Dominick" and
5 "Andre." Two calls between MF2 and Lustig – one incoming on August 24, 2011
6 and one outgoing on September 11, 2011.

7 The Kyocera flip phone had MF2's number saved as "Andrew." Multiple
8 text messages between MF2 and Lustig between October 11, 2011 and June 12,
9 2012. There were six incoming calls and five missed phone calls between MF2
10 and Lustig between October 10, 2011 and November 15, 2011.

11 The iPhone had both MF1-2 saved as "Dominick" and "Andre."

12 **C. MF1-2 are Interviewed**

13 On July 3, 2012, Deputies Chiappino and Crysler contacted MF1 at her
14 residence and interviewed her in reference to the text messages between her and
15 Lustig. During this interview, MF1 identified Lustig through a photographic line
16 up as an individual she knew as "George". MF1 stated Lustig would pay her \$80
17 each time they met for a "hand job." MF1 stated she met with Lustig
18 approximately five to seven times between March 2012 and June 2012. MF1
19 confirmed her old phone numbers were (619) 647-6033 and (619) 381-3539, which
20 match up with the numbers Lustig had saved for "Dominick." MF1 confirmed that
21 she communicated with Lustig via text messaging and verbal conversation with her
22 cell phones.

23 On July 3, 2012, Deputies Chiappino and Crysler contacted MF2 at her
24 school and interviewed her reference the text messages. During this interview
25 MF2 identified Lustig through a photographic line up as an individual she knew as
26 "George". MF2 stated she had full sex with Lustig approximately three times
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1 during October and November, 2011. Lustig would pay her \$200 each time. MF2
2 stated she was thirteen years old while she was involved with prostitution with
3 Lustig. MF2 confirmed her old phone number was indeed (602) 930-8687. MF2
4 confirmed that she communicated to Lustig via text messaging and verbal
5 conversation using (602) 930-8687.

6 **D. Additional Investigation**

7 The minors' phone numbers were analyzed. MF1's phone 619-381-3539
8 showed multiple calls with Lustig as early as April 15, 2012. Records were not
9 available before April 15, 2012. MF1's second phone (619-647-6033) showed no
10 toll records with Lustig.

11 MF2's phone 602-930-8687 showed multiple contacts with Lustig between
12 October 11, 2011 and June 12, 2012.

13 Deputies located motel receipts at various motels on El Cajon Blvd under
14 Lustig's name in 2011-12. Deputy Chiappino obtained video footage of Lustig in
15 his dark colored sedan with MF1 parked in the parking lot, getting out of the car
16 and entering a room on May 30, 2012. About 25 minutes later, the video shows
17 both exiting the room and back to the car. MF1 gets in the back seat of the car.

18 **III**

19 **PERTINENT LAW**

20 **A. 18 U.S.C. §1591 – Sex Trafficking of a Child (Minor Under Age 14)**

21 The elements are:

22
23 1. the defendant knowingly recruited, enticed, harbored, transported,
24 provided, obtained or maintained a person OR benefits, financially or by receiving
25 anything of value, from participation in a venture which has engaged in an act
described above,

26 2. the defendant knowing, or in reckless disregard of the fact that the person
27 had not yet attained the age of 14 years and would be caused to engage in
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1 commercial sex acts and the defendant had a reasonable opportunity to observe the
2 person and

3 3. the defendant's actions were in or affecting interstate or foreign
4 commerce.

5 United States v. Todd, 627 F.3d 329, 334 (9th Cir. 2010); 18 U.S.C.
6 §1591(a), (b).

7 §1591(c) provides that in "any prosecution under (a)(1) in which the
8 defendant had a reasonable opportunity to observe the person so recruited, enticed,
9 harbored, transported, provided, obtained or maintained, the Government need not
10 prove the defendant knew the person had not attained the age of 18 years." United
11 States v. Robinson, 702 F.3d 22 (2nd Cir. 2012)(holding that gov't need only show
12 reasonable opportunity to observe to meet mens rea requirement); United States v.
13 Phea, 2014 U.S. App. LEXIS 11040 (5th Cir. June 13, 2014).

14 Section 1591 is limited, explicitly, to "commercial sex acts," which, by
15 definition, are economic in nature. United States v. Morrison, 529 U.S. 598 (2000)
16 ("Where economic activity substantially affects interstate commerce, legislation
17 regulating that activity will be sustained."). Congress has expressly determined
18 that sexual trafficking has a substantial effect on interstate commerce. See 22
19 U.S.C. § 7101(12); United States v. Evans, 476 F.3d 1176 (11th Cir. 2007)(holding
20 purely intrastate prostitution activity under §1591 "contributes" to the interstate
21 and international market Congress scheme seeks to stop" thus meeting the
22 interstate commerce element). The link between sexual trafficking and interstate
23 commerce is analogous to the link between interstate commerce and drug
24 trafficking, which the courts have held Congress may regulate under the
25 Commerce Clause. See United States v. Todd, 627 F.3d 329, 334 (9th Cir. 2010);
26 United States v. Tisor, 96 F.3d 370, 375 (9th Cir. 1996); United States v. Kim, 94
27 F.3d 1247, 1249-50 (9th Cir. 1996). An act or transaction that is economic in
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1 nature and affects the flow of money in the stream of commerce to any degree,
2 however minimal, “affects” interstate commerce. Gonzalez v. Raich, 545 U.S. 1,
3 17 (2005); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255-56
4 (1964); United States v. Feola, 420 U.S. 671, 677 n.9 (1975); United States v.
5 Evans, 476 F.3d 1176 (11th Cir. 2007); United States v. Pipkins, 378 F.3d 1281,
6 1295 (11th Cir. 2004), *vacated on other grounds*, 544 U.S. 902, *opinion reinstated*,
7 412 F.3d 1251 (11th Cir. 2005); 22 U.S.C. §7101(b).

8 Consent by a minor is not a defense. United States v. Raplinger, 555 F.3d
9 687, 691-2 (8th Cir. 2009); United States v. Dhingra, 371 F.3d 557, 567 (9th Cir.
10 2004); United States v. Rashkovski, 301 F.3d 1133, 1137 (9th Cir. 2002).

11 The Eighth Circuit explicitly held that §1591 applies to both “suppliers and
12 customers” of commercial sex acts. In United States v. Jungers, 702 F.3d 1066
13 (8th Cir. 2013), the court reversed and remanded a Rule 29 motion. Undercover
14 police operating Sioux Falls, South Dakota placed several online advertisements
15 targeting people who wanted to have sex with children. Once such ad was
16 purportedly from a father offering his twin daughters (age 14) and another for an
17 11 year old child for sex in exchange for money. Several “customers” responded
18 via email and agreed to meet with the “father.” When they showed up and paid the
19 money, each defendant was arrested for attempted commercial sex trafficking
20 under §§1591/1594. At trial, the district court granted a Rule 29 motion finding
21 that §1591 did not apply to customers of child sex trafficking.

22 The Eighth Circuit reversed, finding that looking at the statute itself, there
23 was no “customer exception.” Under §1591(a)(1), a person violates the statute if
24 they “obtain” or “transport” a child for the purpose of a commercial sex act. The
25 provision does not limit potential violators to traffickers or pimps. In looking at
26 Jungers trial record, the United States showed that Jungers sought to procure an
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eleven year old girl for the purpose of her to perform oral sex on him based upon text messages he had sent to the undercover. Accordingly, the appellate court sent the case back for sentencing.

B. Criminal Forfeiture – 18 U.S.C. §1593

The United States also alleges criminal forfeiture under 18 U.S.C. §1593. The United States intends to present evidence that the items listed in the indictment were used in the commission of the offenses charged.

1. General Procedures

The indictment in this case includes forfeiture allegations. Entry of an order of forfeiture in a criminal case is considered a part of sentencing. Libretti v. United States, 116 S. Ct. 356, 363 (1995). Nevertheless, the factual determination as to whether any property was involved in or derived from an offense is a matter submitted to the jury if requested by either the Government or the Defendant. Federal Rule Crim. Pro. 32.2(b). If a timely request for bifurcated proceedings is made, certain procedures are required at trial. In the Ninth Circuit, a modified bifurcated procedure is necessary. In United States v. Feldman, 853 F.2d 648, 662 (9th Cir. 1988), cert. denied, 489 U.S. 1030, the court stated:

We therefore exercise our supervisory power to hold that trial courts should bifurcate forfeiture proceedings from ascertainment of guilt, requiring separate jury deliberations and allowing argument of counsel. The trial judge may exercise discretion in deciding whether or not to hold an evidentiary hearing.

The sole issue to be determined by a jury in a bifurcated trial is whether the Government has established the requisite nexus between the property and the offense committed by the defendant. The jury does not order the forfeiture of property; nor does it consider third-party claims. Fed. R. Crim.P. 32.2(b), (c). In

1 this regard, the government will submit separate proposed jury instructions and a
2 proposed special verdict form. The jury's special verdict will serve as the basis for
3 this Court to enter a preliminary order of forfeiture. Fed.R.Crim.P. 32.2(b)(2), (3).
4 The final order of forfeiture will follow notice and advertisement of the
5 preliminary order and will address any third-party claims. Fed.R.Crim.P.
6 32.2(b)(2), (c).

7 The United States notes that Feldman was a case involving a Racketeer
8 Influenced and Corrupt Organization (RICO) forfeiture, which requires that the
9 trier of fact determine the amount of "tainted" value of a defendant's interest in (or,
10 e.g., claim against) an "enterprise," which can involve complex matters of proof.
11 See 18 U.S.C. § 1962(a)(1)(A).

12 In this case, however, there is no such complexity. The United States is
13 seeking criminal forfeiture of the cellphones and the vehicle used in the
14 commission of the offenses listed in the indictment.

15 The United States requests that, if this case is tried to a jury, that the jury in
16 the first instance not be informed of the criminal forfeiture count, but hear
17 evidence on and deliberate as to Counts 1-2 only. In the event that the jury returns
18 a verdict of guilty on any of the counts listed in the indictment, that they hear
19 argument of counsel on the forfeiture allegations and that they then be instructed
20 and deliberate upon a special verdict as to the criminal forfeiture allegations. The
21 United States does not believe that additional evidence on the forfeiture is likely to
22 be necessary.

23 Federal Rule of Criminal Procedure 32.2(a) states:

24 **Notice to the Defendant.** A court must not enter a
25 judgment of forfeiture in a criminal proceeding unless the
26 indictment or information contains notice to the defendant
27 that the government will seek the forfeiture of property as
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1 part of any sentence in accordance with the applicable
2 statute.

3 In this case, the criminal forfeiture allegations fully allege and describe the
4 property subject to forfeiture.

5 A special verdict should be provided to the jurors for their use, if they are
6 called upon to deliberate on the nexus between the criminal activity that forms the
7 basis for the convictions and the criminal forfeiture allegations.

8 2. Burden of Proof

9 Criminal forfeiture is considered to be a penalty or sentencing provision, and
10 not a separate offense. Libretti v. United States, 116 S. Ct. 356, 363 (1995). As
11 such, the burden of proof upon the United States to support a special verdict of
12 forfeiture is “preponderance of the evidence” rather than “beyond a reasonable
13 doubt.” United States v. Hernandez-Escarsega, 886 F.2d 1560, 1566-67 (9th Cir.
14 1989), cert. denied, 497 U.S. 1003. (This difference of burdens also supports the
15 bifurcation of proceedings, as less likely to confuse the jury.)

16 3. Exclusion of Claims of Third-Party Ownership

17 Evidence, if any, of interest held by third parties in the property the United
18 States is seeking to forfeit is irrelevant in the criminal phase of this trial. The jury
19 does not consider whether the defendant has an interest in the property to be
20 forfeited; nor does the jury determine the extent of the defendant’s interest in any
21 property to be forfeited. These matters are considered by the court in the ancillary
22 proceedings, following the jury’s special verdict and entry of the preliminary order
23 of forfeiture. Fed.R.Crim.P. 32.2(b), (c); Advisory Committee Note to Subsection
24 (b). The government is seeking to forfeit the interest held by the defendant in the
25 property. The claims of any third parties to the property are dealt with in the
26 ancillary proceeding after the order of forfeiture. Title 21, U.S.C., Section 853(n)
27 sets forth specific procedures to be used by third-party claimants to forfeited
28 property, all of which take place following an order of forfeiture. It is clear that

1 claims of third party ownership cannot defeat the initial forfeiture proceedings or
2 an order of forfeiture issued thereon, but are separate, post-order matters.
3 Evidence of any third-party ownership of the property should be excluded until an
4 order forfeiting all of the defendant's right, title, and interest in the property has
5 issued.

6 **IV**

7 **WITNESSES**

8 The United States reserves the right to change the order of, substitute, or add
9 or omit one or more witnesses. The United States expects to call the following
10 witnesses during its case-in-chief:

- 11 1. MF1
- 12 2. MF2
- 13 3. Deputy Chase Chiappino
- 14 4. Special Agent Lana Sabata
- 15 5. Deputy George Crysler

16 **V**

17 **EXHIBIT LIST**

18 A final exhibit list will be provided at trial. The United States anticipates
19 offering the following exhibits at trial, all of which have been produced or
20 otherwise made available to counsel. The United States reserves the right to add,
21 delete, or amend its exhibit list.

- 22 1. Video surveillance from Ace Hotel
- 23 2. Hotel receipts
- 24 3. Phone extractions/text messages
- 25 4. Photos
- 26 5. Phone records

6. Emails

VI
VOIR DIRE

The United States request that the following voir dire questions be addressed to the jury panel in addition to the Court's standard jury instructions:

1. Of those of you have sat on criminal juries, whose jury reached a unanimous verdict?
2. Has anyone had an unpleasant experience with any law enforcement personnel?
3. Has anyone had any disputes with any agency of the United States Government?
4. Have you, your relatives, or your close friends been investigated, arrested, accused, or charged with a crime? A sex crime? A sex crime involving children?
5. Does everyone understand that as a juror your duty is to apply the law regardless of whether you disagree with it?
6. Does everyone understand that as a juror you are not to consider prejudice, pity, or sympathy in deciding whether the Defendant is guilty or not guilty?
7. Does anyone think that, regardless of the strength of the evidence, they will have trouble deciding whether the Defendant is guilty or not guilty?
8. Does anyone think they cannot decide whether a person is guilty or not guilty?

1 9. Does anyone have religious or moral beliefs which will make it difficult
2 for them to make a decision strictly based on the law and facts of this
3 case?

4 10. Does anyone believe that prostitution should be legal? How about
5 prostitution of minors under age 18? How about engaging in commercial
6 sex with minors?

7 11. If selected as a juror, you will have to hear evidence involving the sexual
8 exploitation of a minor. The evidence may be distasteful, offensive, and
9 unpleasant to hear. However, the prospect of having to see or hear
10 distasteful, offensive or unpleasant evidence is not a basis to avoid the
11 responsibility of jury service. Many cases, both criminal and civil,
12 involve unpleasant things. If we excused prospective jurors on the
13 ground that jury duty makes demands - including some unpleasant
14 demands - then we could not function. Moreover, the parties have the
15 right to expect that prospective jurors will not seek to avoid jury service
16 simply because they would rather not serve, or because they would like
17 to avoid some unpleasantness. Having said that, is there anyone who
18 honestly believes there is some compelling reason why he or she could
19 not be an impartial juror - that is to consider all of the evidence and
20 follow the law - simply because evidence of sexual exploitation of a
21 minor will be presented as evidence in the trial?

22 The United States respectfully reserves the right to submit additional
23 questions prior to trial.
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VII

JURY INSTRUCTIONS

The United States will submit proposed instructions to the Court the morning of trial. The United States reserves the right to request additional instructions during the course of the trial.

DATED: July 30, 2014

Respectfully submitted,

LAURA E. DUFFY
United States Attorney

s/Alessandra P. Serano
ALESSANDRA P. SERANO
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 13CR3921-BEN
)
Plaintiff,)
)
v.)
) CERTIFICATE OF SERVICE
Michael Lustig,)
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED THAT:

I, ALESSANDRA P. SERANO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of United States' Trial Memo on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Tim Scott, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 30, 2014

s/Alessandra P. Serano

ALESSANDRA P. SERANO